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## SUMMARY

The 37 Rural Telephone Companies who are members of the State Independent Alliance and the Independent Telecommunications Group (the "Independents") respectfully request that the Commission issue a declaratory ruling clarifying that Western Wireless' Basic Universal Service offering in Kansas is not a Commercial Mobile Radio Service and that federal law does not preempt or otherwise prohibit Kansas from applying regulations and USF requirements generally applicable to all local exchange carriers and to ETCs in Kansas. The Independents make this request in light of the Commission's invitation in the Second Report and Order in WT Docket 96-6, FCC 00-246 (rel. July 20, 2000) for parties to seek declaratory rulings, on a case-by-case basis, to determine whether particular fixed wireless service offerings are CMRS.

On February 29, 2000, the Kansas Corporation Commission designated Western Wireless as an ETC for both federal and state universal service programs with respect to its Basic Universal Service offering in non-rural areas. It will soon address the issue of whether to designate Western Wireless as an ETC for the rural areas served by the Independents. Throughout the Kansas proceeding, Western Wireless has maintained that its fixed wireless local loop service is CMRS and is not subject to a variety of regulations and USF requirements generally applicable to all local exchange carriers and to ETCs in Kansas. The service, however, is not CMRS.

The fixed wireless local loop service for which Western Wireless seeks ETC designation uses Western Wireless' cellular network to connect customers to the PSTN, and is intended to be a substitute for wireline local exchange service. It is provided through the use of a Fixed Wireless Terminal, which takes the place of the Network Interface Device used in wireline telephony in

that a customer's standard telephone sets and inside wire connect to it.

The Fixed Wireless Terminal radio station is not mobile within the meaning of the Act because while it is capable of being moved, it does not ordinarily move. *See* 47 U.S.C. § 153(28). For this and other reasons, Western Wireless' fixed wireless local loop service is not CMRS. Hence, Kansas is not preempted by Section 332(c)(3) of the Act from regulating it as any other local exchange service nor is Kansas barred from applying the same universal service conditions to this service as generally apply to all universal service offerings in Kansas.

Thus, Western Wireless' claimed status as a CMRS carrier has been the subject of much confusion and controversy in the Kansas proceeding. Accordingly, the Independents respectfully request that the Commission issue the declaratory ruling they seek in order to eliminate the controversy and to end the confusion. *See* 47 C.F.R. § 1.2.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)
	)
Petition of the State Independent	)
Alliance and the Independent	)
Telecommunications Group for a	)
Declaratory Ruling That the	)
Basic Universal Service Offering	)
Provided by Western Wireless in	)
Kansas is Subject to Regulation as	)
Local Exchange Service	)

**PETITION FOR DECLARATORY RULING**

The 37 independent telephone companies identified in Attachment A hereto, by and through the State Independent Alliance ("SIA") and the Independent Telecommunications Group ("ITG") (collectively, the "Independents"), which together include all of the independent local exchange carriers operating in Kansas, respectfully request, pursuant to the *Second Report and Order and Order on Reconsideration* in WT Docket No. 96-6<sup>1</sup> and Section 1.2 of the Commission's rules,<sup>2</sup> that the Commission issue a declaratory ruling that the Basic Universal Service (BUS) offering of WWC Holding Company, Inc. d/b/a CellularONE ( "Western Wireless") in the State of Kansas is a fixed service rather than a Commercial Mobile Radio Service (CMRS) and is subject to regulation as a local exchange carrier service, and that such regulation is not preempted by Section 332(c)(3) or other sections of the Communications Act.

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<sup>1</sup> *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, Second Report and Order and Order on Reconsideration, WT Docket 96-6, FCC 00-246 (rel. July 20, 2000) ("*Second Report and Order*").

<sup>2</sup> 47 C.F.R. § 1.2.

The Independents seek a declaratory ruling from the Commission to remove any confusion about the state and federal regulatory status of Western Wireless' BUS offering in Kansas and other consequences that flow from that determination.<sup>3</sup> The Independents make this request in response to the Commission's invitation in the *Second Report and Order* for parties to request declaratory rulings regarding the regulatory status of particular fixed wireless service offerings on a case-by-case basis.<sup>4</sup>

## I. INTRODUCTION AND BACKGROUND

On February 29, 2000, the Kansas Corporation Commission (the "KCC") granted, with respect to non-rural areas, Western Wireless' petition seeking to be designated as an Eligible Telecommunications Carrier ("ETC") for its cellular service area covering a large portion of the eastern half of Kansas.<sup>5</sup> Western Wireless' application claimed eligibility for ETC status on the

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<sup>3</sup> Declaratory rulings are intended to terminate controversy and to eliminate confusion. 47 C.F.R. § 1.2.

<sup>4</sup> *Second Report and Order* at paras. 7-8 ("To the extent that a party requires a determination of whether or not a particular service that includes a fixed wireless component should be treated as CMRS, that party should petition the Commission for a declaratory ruling."). The Commission previously amended its rules to permit CMRS licensees to provide fixed wireless services on a co-primary basis with mobile services. *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd 8965 (1996) ("First Report and Order").

<sup>5</sup> *Order #6 Granting Sprint PCS and Western Wireless ETC Designation in Non-Rural Telephone Company Wire Centers for Federal Universal Service Support Purposes*, KCC Docket Nos. 99-GCCZ-156-ETC and 99-SSLC-173-ETC (Jan. 18, 2000) ("Order #6") and *Order #7: On Reconsideration*, KCC Docket Nos. 99-GCCZ-156-ETC and 99-SSLC-173-ETC (Feb. 29, 2000) ("Order #7"). Copies of both orders are attached as Attachment H. *See also* Verified Petition for Designation, Kansas Corporation Commission Docket No. 99-GCCZ-156-ETC (September 2, 1998) ("Designation Petition") (copy attached as Attachment G). A map of Western Wireless' cellular coverage area in Kansas is available at [www.cellularonewest.com/plan.asp](http://www.cellularonewest.com/plan.asp). Filed pleadings and Kansas Corporation Commission orders are available at [www.kcc.state.ks.us/docket/cal.html](http://www.kcc.state.ks.us/docket/cal.html).

basis of its intent to offer a service meeting all the criteria in Section 54.101(a) of the Commission's rules regarding universal service ("USF"), as well as applicable Kansas rules for Kansas USF ("KUSF").<sup>6</sup> The service, which Western Wireless designated Basic Universal Service ("BUS"), would be provided by means of wireless transmission to and from special radio station equipment. The two-way transmissions would be carried over Western Wireless' existing facilities providing cellular mobile service.<sup>7</sup>

The KCC granted Western Wireless' application with respect to the service areas of non-rural telephone companies by designating Western Wireless as an ETC for both the federal and the state universal service programs in those areas in *Order #6 and Order #7*. The KCC is currently considering also whether to grant ETC designation in the service areas of the SIA's and ITG's member Rural Telephone Companies subject to the Western Wireless application.

Throughout the Kansas proceeding, Western Wireless has maintained that it is not subject to a variety of state regulations that otherwise apply to all local exchange carriers because it is a CMRS carrier to whom those regulations either don't apply or are preempted by Section 332(c)(3).<sup>8</sup> Over the objections of the Independents, the KCC has generally accepted these contentions and excused Western Wireless' non-compliance with several state regulations and requirements generally applicable to local exchange carriers and to recipients of Kansas USF on

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<sup>6</sup> *Designation Petition* at pp. 2-4. See 47 C.F.R. § 54.101(a).

<sup>7</sup> Direct Testimony of James H. Blundell on Behalf of GCC License LLC in Kansas Corporation commission Docket Nos. 99-GCCZ-156-ETC and 99-SSLC-173-ETC at pp. 10-11 ("*Blundell Direct*").

<sup>8</sup> See, e.g., Brief of GCC License Corporation, KCC Docket Nos. 99-GCCZ-156-ETC and 99-SSLC-173-ETC (April 30, 1999) at p. 4.



the basis of Western Wireless' status as a CMRS provider.<sup>9</sup>

Importantly, the KCC has not specifically ruled whether Western Wireless' BUS offering is a CMRS service, even though it has relied on Western Wireless' claims that it is a CMRS provider in its orders designating Western Wireless as an ETC for non-rural areas. In a pleading due to be filed next week, SIA will ask the KCC to rule specifically on the question of whether Western Wireless' BUS offering is CMRS before moving on and before taking up the issue of designating Western Wireless as an ETC in rural areas served by SIA's and ITG's member Rural Telephone Companies. The issue, however, is appropriate, if not more appropriate, for the Commission.

Whether Western Wireless' BUS offering is or is not CMRS and the extent to which federal law may preempt state requirements generally applicable to local exchange carriers and to ETCs are important considerations as the KCC examines the public interest factors relevant to designating a second ETC in the service areas of SIA's and ITG's member Rural Telephone Companies. Because the service offered by Western Wireless is a fixed service intended to be a substitute for wireline telephone service, the Independents assert that BUS is not CMRS and that regulation of the intrastate aspects of the service by the KCC is not preempted by Section 332(c)(3) or any other section of the Act. The members of SIA and ITG will be harmed in their ability to continue providing high quality service at reasonable rates to their subscribers if they are

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<sup>9</sup> See, e.g., *Order #6* at pp. 4, 11, and 14. See also Part III(A), *infra*, for a fuller discussion of instances where the KCC treated Western Wireless differently. The KCC also relied to some extent on state law limits on its jurisdiction over "radio common carriers." The Independents do not ask the Commission to decide matters of Kansas law. Instead, they ask the Commission to decide on the basis of federal law whether Western Wireless' BUS offering is CMRS and the extent to which Kansas may apply to it regulations and USF requirements generally applicable to local exchange carrier services.

forced to compete with a close substitute service which is not subject to comparable regulation. In order to remove the uncertainty affecting this critical portion of the pending proceeding, the Independents respectfully request that the Commission declare that Western Wireless' BUS offering is not CMRS and that federal law does not prohibit or preempt Kansas from applying to it regulations and USF requirements that are generally applicable to local exchange carrier services.

**II. THE BUS OFFERING OF WESTERN WIRELESS IS A FIXED SERVICE INTENDED AS A SUBSTITUTE FOR WIRELINE TELEPHONE SERVICE; IT IS NOT CMRS**

**A. Neither the Act Nor the Commission's Rules Presume That All Services of CMRS Licensees Are Commercial Mobile Services for Which State Entry and Rate Regulation Are Preempted by Section 332(c)(3)**

Section 332(c)(3) of the Act preempts state regulation of entry or rates charged by commercial mobile service, although regulation of "other terms and conditions of commercial mobile services" is permitted.<sup>10</sup> Section 3(27) defines mobile service as a service involving mobile stations and Section 3(28) defines a mobile stations as a "radio-communications station capable of being moved *and which ordinarily does move*."<sup>11</sup> In the *Second Report and Order*, the Commission expressly rejected any presumption that all wireless service offerings of CMRS licensees are CMRS (*i.e.*, that the service should be regulated as a mobile service), and declined to set forth specific factors that it would consider in determining whether a particular wireless offering is CMRS.<sup>12</sup>

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<sup>10</sup> 47 U.S.C. 332(c)(3).

<sup>11</sup> 47 U.S.C. 153(27) and (28) (emphasis added).

<sup>12</sup> *Second Report and Order* at paras. 7-8.

The Commission reached this conclusion after extensive proceedings in which it first determined that licensees in the cellular mobile service and PCS services would not be limited to providing fixed service only when it was “ancillary” to mobile, but could devote their entire assigned spectrum, or substantial parts of it, to fixed service. The Commission concluded, contrary to the arguments of several parties, that the provision of non-mobile service by a holder of a licence in the mobile service bands did not per se entitle the carrier to the protection from state regulation granted by Congress to mobile services.<sup>13</sup>

**B. BUS is Local Exchange Carrier Telephone Service Provided by Means of a Wireless Local Loop**

BUS is a fixed wireless local loop service that is offered as a substitute for wireline local exchange service. Western Wireless has been careful to mimic the look and feel of wireline local exchange service, including the provision of a dial tone sound, a feature not associated with CMRS. BUS is neither a mobile service within the meaning of the Communications Act nor is it offered in conjunction with a mobile service. Indeed, Western Wireless calls it a wireless local

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<sup>13</sup> *First Report and Order*, 11 FCC Rcd at 8985-8987. Note that the Commission did not even accept the argument that all services offered by PCS licensees were *de jure* mobile, despite the provisions of Section 3(27)(C). *Id.*, 11 FCC Rcd at 8986.

loop service<sup>14</sup> or a fixed wireless residential service.<sup>15</sup> At the same time, however, Western Wireless claims CMRS status to avoid regulation, to avoid competing on a level playing field with wireline carriers, or to avoid competitively neutral universal service conditions expected of all carriers designated as ETCs. Western Wireless claims that its BUS offering satisfies all universal service requirements for ETC status in Kansas.<sup>16</sup> As indicated above, Western Wireless requested ETC status for a substantial geographic portion of the State, including the service areas of both non-rural and Rural Telephone Companies.<sup>17</sup>

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<sup>14</sup> *Blundell Direct* at p. 10; Letter, with attachment, from James H. Blundell, Director, External Affairs for Western Wireless, to Magalie Roman Salas, Secretary, FCC (April 28, 2000) (filed as an *ex parte* presentation in CC Docket No. 96-45 and WT Docket No. 99-266). The attachment is the testimony of Mikal Thomsen, President and Chief Operating Officer of Western Wireless Corporation to the Federal-State Joint Conference on Advanced Services' Midwestern field hearing in South Sioux City, Nebraska on April 19, 2000. Both the letter and the remarks describe Western Wireless' BUS local exchange service offering as a wireless local loop service.

<sup>15</sup> Western Wireless Corporation, Form 10-K (March 20, 2000) at p. 4. These descriptions directly apply to the Kansas BUS offering. Western Wireless offers or seeks to offer an identical service in Kansas and other states. Transcript of Cross Examination Testimony of James H. Blundell at p. 53 (Western Wireless' Kansas BUS offering is the "precise service" that it has launched elsewhere for \$14.99 per month) ("*Blundell Cross*") (copy attached as Attachment D) and *Blundell Direct* at pp. 10-11 (Western Wireless' Kansas BUS offering is the same service that it offers in Nevada and North Dakota).

<sup>16</sup> Attachment B hereto is a complete description of the Kansas BUS offering that submitted to the Kansas Corporation Commission. The description discusses features, functionalities, calling scopes, and prices, and includes a tariff-like "service agreement" that will govern provision of BUS service. It also includes a description of why Western Wireless believes the BUS offering satisfies both federal and state USF requirements.

<sup>17</sup> Attachment B and GCC License Corporation's ("Western Wireless") Response to State Independent Alliance's Data Requests to WWW Co., Inc. d/b/a Cellular One at p. 14 ("*SIA Interrogatories*") (copy attached as Attachment F). Essentially, Western Wireless intends to offer BUS throughout its cellular coverage area in Kansas.

Western Wireless uses a "Fixed Wireless Terminal" manufactured by Telular to provide its BUS service.<sup>18</sup> The Fixed Wireless Terminal takes the place of the Network Interface Device ("NID") used for wireline telephony.<sup>19</sup> Instead of a NID, the customer's existing standard telephones and inside wire connect, via standard RJ11 jacks, to the Fixed Wireless Terminal. Fax machines and computers can also be connected using standard jacks.

The Fixed Wireless Terminal itself can be mounted on a wall or placed on a flat surface. The Fixed Wireless Terminal measures approximately six and one-half to thirteen inches long, eight and one-half to eleven and one-half inches wide, and two and one-half inches tall, depending on model. It weighs one and one-half to two and one-half pounds, excluding the lead acid backup battery. A model that has a built-in lead acid backup battery weighs 10 pounds.<sup>20</sup> Each Fixed Wireless Terminal comes with a short antenna. Larger, high-gain antennae, some for exterior mounting on a building, are optional. Power is provided by plugging the Fixed Wireless Terminal into an electrical outlet. The available lead acid backup battery provides up to one hour of talk

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<sup>18</sup> See [www.telular.com](http://www.telular.com) for a complete description of the Fixed Wireless Terminal. Product brochures for all models shown on the web site are attached as Attachment C. The Fixed Wireless Terminal, which Western Wireless termed a "wireless access unit" in Kansas, is also described in Attachment D, *Blundell Cross* at pp. 57-63. Additional information may also be found in Attachment F, *SLA Interrogatories*.

<sup>19</sup> See *Blundell Direct* at 10-11. The Fixed Wireless Terminal is properly considered network equipment, not customer premises equipment. Western Wireless, not the customer, will own it (*Blundell Cross* at p. 69) and there is no indication in the record that Western Wireless will charge the customer for its use, other than the monthly service fee. Further, as a NID substitute, it is the demarcation point between the customer and the network – it is the point at which the customer connects his equipment to the network. .

<sup>20</sup> Model Phonecell SX2o for GSM 900. Other models, such as the SX2e, use a separate free-standing backup battery unit.

time and eight hours of standby time in the event of a power outage.<sup>21</sup> Finally, the Fixed Wireless Terminal produces a dial tone-like sound on conventional telephones.<sup>22</sup>

The Fixed Wireless Terminal used by Western Wireless for its BUS offering is designed, manufactured, and marketed to be used to provide fixed wireless service.<sup>23</sup> Western Wireless claims in Kansas and elsewhere, however, that its fixed wireless BUS offering should be considered CMRS because it also has mobile capability in that the Fixed Wireless Terminal can be “picked up, placed in the car, rolled down the road and taken to the barn.”<sup>24</sup> For the Commission to accept this claim, it must render the key statutory phrase “ordinarily does move” entirely meaningless, and change the statutory definition of “mobile station” to “capable of being moved with considerable difficulty and inconvenience.” Western Wireless admits that “mobile” service can occur using the Fixed Wireless Terminal only after it is unplugged from the electrical outlet that powers it, the back-up battery installed, the structure-mounted antenna disconnected, and a short antenna connected.<sup>25</sup> Of course, the customer would also have to take along a separate standard telephone and connecting cord from his or her house. Western Wireless also states,

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<sup>21</sup> Having a backup battery at the service location makes sense because there is no wire connecting the customer’s telephones to a central office battery or emergency generator to provide power during power outages.

<sup>22</sup> See Attachments C, D and F.

<sup>23</sup> See Attachment C.

<sup>24</sup> *Blundell Cross* at p. 57. In actuality, Western Wireless offers a fixed wireless BUS service and a mobile wireless service. By offering both services, Western Wireless hopes that state and federal regulators will permit it to escape regulatory authority and state oversight of universal service that is specifically prescribed in the Act. See 47 U.S.C. §§ 332(c)(3) and 254.

<sup>25</sup> *SLA Interrogatories* at p. 27.

however, that the Fixed Wireless Terminal is expected “typically to be plugged into the wall” outlet and that the backup battery is there in case of power outages.<sup>26</sup>

Telular’s description of its Fixed Wireless Terminal and the additional peripheral equipment required to be attached to it for it to be a functioning radio station demonstrates that Telular did not design the Fixed Wireless Terminal to be used in a mobile fashion. The Fixed Wireless Terminals are large and heavy compared to cellular phones offered for mobile use, many of which weigh mere ounces and are hand- or palm- sized.<sup>27</sup> The Fixed Wireless Terminal also uses heavy lead acid batteries, which are commonly used in automobiles, not mobile phones. Additionally, the Fixed Wireless Terminal lacks a number pad, mouthpiece, and ear piece, all of which must be supplied by attaching a separate standard telephone to it. Of course, one need look no farther than the name to see that the “Fixed Wireless Terminal” is not offered as a device that is intended to be “ordinarily” mobile.

Western Wireless’ BUS offering is a fixed wireless service for the same reasons that the Commission long ago determined that Basic Exchange Telephone Radio Service (“BETRS”) is not a mobile service. The Commission found that “the substitution of a radio loop for a wire loop in the provision of BETRS does not constitute mobile service for purposes of our definition [of

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<sup>26</sup> *Blundell Cross* at pp.60-61. This statement is consistent with the product information available at Telular’s web site and reproduced in Attachment C.

<sup>27</sup> Compare the Fixed Wireless Terminal radio station to the radio station units offered for mobile use by Western Wireless on its website, [www.cellularonewest.com](http://www.cellularonewest.com). With the exception of one bag phone, all of the truly mobile radio stations are small enough to fit in the user’s hand.

mobile service].”<sup>28</sup> The same is true with respect to Western Wireless’ fixed wireless local loop offering. Neither a BETRS radio nor a Fixed Wireless Terminal ordinarily move. They are both intended for installation at a customer’s premises for the purpose of providing local exchange telephone service at that premises.<sup>29</sup>

### **C. Other Characteristics Further Distinguish BUS From CMRS**

In addition to the Fixed Wireless Terminal and other hardware, there are other characteristics that clearly distinguish BUS from CMRS.

#### **1. Western Wireless’ Fixed Wireless BUS Offering is Designed to Look and Feel Like Conventional Wireline Local Exchange Service**

Using Telular’s Fixed Wireless Terminal, Western Wireless has captured the “look and feel” of conventional wireline telephone service for its fixed wireless local loop service. Indeed, with the use of conventional telephones and the existence of a dial tone sound, the fact that wireless technology is used to provide BUS service is transparent to end users. The new wireless service they receive in their homes looks and feels just like their old wireline service. Western Wireless wants its fixed wireless offering to walk like, talk like, and even sound like fixed wireline service. In fact, Western Wireless wants everyone, except the Commission and state

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<sup>28</sup> *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, 1425 (1994) (“*Regulatory Parity Order*”).

<sup>29</sup> The comparison between BETRS and BUS goes farther. The physical nature of the radio transceivers used for BUS and for BETRS, respectively, share several similarities. Both are radio transmitters intended to connect the end user to the PSTN and essentially take the place of a wireline NID. Both connect to the customer’s existing standard telephones and inside wire, and require a separate telephone instrument to be attached in order for them to function. Both have battery backup to their primary power sources, but are not primarily battery powered. They are similarly sized — the Fixed Wireless Terminal used by Western Wireless is about the size of a laptop computer, while a BETRS radio unit is about the size of a bread box. Both are sufficiently large that they are not easily movable.



regulators, to think of BUS as a fixed wireline replacement service.

**2. Western Wireless Does Not Intend BUS to be a Mobile Service**

Western Wireless has testified in Kansas that BUS service should be associated with a particular address and that it would take steps to ensure that the Fixed Wireless Terminal would not be used by customers to obtain BUS service in place of mobile service offerings.<sup>30</sup> Thus, while it is true that the Fixed Wireless Terminal may be technically capable of being moved so that BUS customers could use it to communicate while moving, Western Wireless does not intend for BUS customers to ordinarily move it.

The reason for this is clear. The BUS offering is priced at least \$10.00 per month less than the least expensive mobile service plan of Western Wireless and includes unlimited usage compared to the 75 minutes included in the least expensive mobile plan.<sup>31</sup> Obviously, Western Wireless does not intend for all of its truly mobile customers to switch to its BUS offering because such a shift would result in a dramatic reduction in revenues.

**D. Western Wireless and the Commission Have Both Described BUS Service as Fixed**

Both Western Wireless and the Commission have previously described BUS service as fixed. In its annual report to shareholders filed with the Securities and Exchange Commission on March 20, 2000, Western Wireless stated that it was using a wireless device to provide “fixed Wireless Residential Service (“WRS”).” Western Wireless also explained that this “fixed Wireless

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<sup>30</sup> *Blundell Cross* at pp. 72-74. See also *Blundell Cross* at pp. 60-61 (the Fixed Wireless Terminal is primarily intended to be plugged into a wall socket).

<sup>31</sup> See *Blundell Cross* at pp. 72-74. See also [www.cellularonewest.com/plan.asp](http://www.cellularonewest.com/plan.asp) (October 8, 2000) for a description of Western Wireless’ mobile rate plans.

Residential Service” would be used to provide the customers’ “principle residential phone.” Additionally, Western Wireless noted that it would seek USF support for this “fixed Wireless Residential Service.”<sup>32</sup> Western Wireless has even told the Commission that its wireless local loop service is a fixed service.<sup>33</sup>

Notably, the Commission has publicly described Western Wireless’ identical local exchange service offering in other states as fixed, wireless local loop service. In its August 18, 1999 Further Notice of Proposed Rulemaking (“FNPRM”) in WT Docket 99-266, the Commission stated that “Western Wireless is operating fixed wireless systems in Nevada and North Dakota using its cellular licenses.” The Commission further described its understanding of the service: “Users connect to the Public Switched Telephone Network (PSTN) by way of a laptop-sized unit provided by Western Wireless,” and “. . . Western Wireless’ fixed loop local service is priced at \$14.99 per month . . . .”<sup>34</sup> The Commission relied on its already existing understanding that BUS service is fixed rather than mobile, and cited published press reports of Western Wireless’ activities and statements by Western Wireless officials as the basis for its

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<sup>32</sup> Western Wireless Corporation, Form 10-K (March 20, 2000) at p. 4.

<sup>33</sup> *Comments of Western Wireless Corporation*, WT Docket No. 96-6, Amendment of the Commission’s Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services (November 25, 1996) at p. 1 (“Western Wireless 1996 Comments”) (“WWC is well-situated to provide fixed wireless service, including wireless local loop service, to consumers . . .”).

<sup>34</sup> *Extending Wireless Telecommunications Services To Tribal Lands*, Notice of Proposed Rulemaking, WT Docket No. 99-266, FCC 99-205 (rel. Aug. 18, 1999) at para. 9 (“*Tribal Lands NPRM*”). See *Blundell Cross* at p. 53 (Western Wireless’ Kansas BUS offering is the “precise service” that it has launched elsewhere for \$14.99 per month) and *Blundell Direct* at pp. 10-11 (Western Wireless’ Kansas BUS offering is the same service that it offers in Nevada and North Dakota).

description of Western Wireless' service.<sup>35</sup>

**III. THE BUS OFFERING OF WESTERN WIRELESS IN KANSAS SHOULD BE SUBJECT TO THE SAME REGULATIONS AND USF REQUIREMENTS AS ARE GENERALLY APPLICABLE TO ALL LOCAL EXCHANGE SERVICES**

**A. The KCC Did Not Apply to Western Wireless' BUS Offering the Same Regulations and USF Requirements as are Generally Applicable to All Local Exchange Services**

In designating Western Wireless as an ETC for non-rural areas, the KCC did not apply to Western Wireless several regulations generally applicable to all LECs and requirements applicable to all recipients of Kansas universal service support because of its interpretation of both Kansas and federal law, especially Section 332(c)(3) of the Communications Act.<sup>36</sup> The rulings affected by the KCC's interpretation of federal law are discussed in more detail below.

Relying on Section 332(c)(3) and Western Wireless' claimed status as a CMRS carrier, the KCC declined to require Western Wireless to obtain a certificate of public convenience and authority, even though Kansas law requires all local exchange carriers to be so certificated.<sup>37</sup> The KCC found that 332(c)(3) bars application of Kansas certification requirements to Western Wireless as a form of entry regulation even though Western Wireless' BUS offering is not CMRS.

The KCC similarly declined to require Western Wireless to provide equal access as a condition of receiving KUSF support even though Kansas law defines Universal Service as

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<sup>35</sup> See *Tribal Lands NPRM* at para. 9.

<sup>36</sup> As previously stated, the Independents do not ask the Commission to address matters of Kansas law. Instead, they seek a declaratory ruling on the basis of federal law that Western Wireless' BUS offering in Kansas is not CMRS and that Section 332(c)(3) does not preempt Kansas from regulating that service as a local exchange service.

<sup>37</sup> *Order #6* at pp. 2-4.

including “equal access to long distance services.”<sup>38</sup> The KCC found that Sections 332(c)(8) of the Communications Act and Section 54.101(a)(7) of the Commission’s rules bar it from requiring Western Wireless to provide equal access to its BUS customers.<sup>39</sup> Section 332(c)(8), however, states that a CMRS carrier cannot be required to provide equal access, but “only insofar as” the carrier is engaged in providing CMRS.<sup>40</sup> Additionally, Section 54.101(a)(7) is a criterion for being designated as an ETC for federal USF purposes, not KUSF. Moreover, a state is free to apply additional requirements in designating ETCs for federal purposes over and above those contained in the Commission’s rules.<sup>41</sup> Any additional requirements a state may apply, however, would have to be consistent with Section 253 of the Act.<sup>42</sup>

There are other important public interest considerations that will be addressed by the KCC with respect to designating Western Wireless as an ETC in rural areas and that are associated with Western Wireless’ CMRS status. These include the inability of BUS customers to list their telephone numbers in white pages directories because CMRS carriers don’t publish directories or include their customers’ telephone numbers in directories published by others, and determining the service location for USF purposes when the customer is allegedly mobile.

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<sup>38</sup> *Order #6* at pp. 11; *Order #7* at pp. 4-5. *See* K.S.A. § 66-1,187(p).

<sup>39</sup> *Order #7* at pp. 4-5.

<sup>40</sup> The Commission may also require CMRS carriers to provide equal access for truly mobile services under certain circumstances. 47 U.S.C. § 332(c)(8).

<sup>41</sup> *TX OPUC*, 183 F. 3d at 418.

<sup>42</sup> 47 U.S.C. § 253.

Data services will also play a prominent role in the public interest discussion. Kansas law requires all Rural Telephone Companies and other local exchange carriers to support dial-up Internet access at a minimum data transmission speed of 19.2 Kbs.<sup>43</sup> Western Wireless claims that the Fixed Wireless Terminal is capable of providing data transmission speeds of 9.6 Kbs to 14.4 Kbs,<sup>44</sup> which falls short of the statutory minimum. The manufacturer, however, claims data transmission speeds of 9.6 Kbs and 2.6 Kbs for the two models for which it lists data transmission speeds.<sup>45</sup>

**B. Comparable Regulatory Treatment is Necessary to Maintain Technological Neutrality**

NARUC warned in its comments prior to the *First Report and Order* that allowing CMRS providers to provide fixed wireless local exchange services while still regulating them as mobile service providers would have the effect of favoring wireless technology over wireline technology, especially given the very different ways in which states regulate wireline and wireless mobile carriers.<sup>46</sup> In light of the events playing out in Kansas, this prediction appears particularly prescient. The Commission should therefore ensure that all CLECs are similarly regulated, regardless of the technology they use. To achieve this, the Commission need only declare that Western Wireless' BUS offering is not CMRS and that, under federal law, it is subject to the same

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<sup>43</sup> K.S.A. § 66-2,011 (b) and (c). SIA's and ITG's member Rural Telephone Companies all support 28.8 Kbs and many support 56 Kbs.

<sup>44</sup> *Blundell Cross* at p. 67.

<sup>45</sup> See Attachment C with respect to models SX4e for TDMA 800 and SX2o for GSM 900.

<sup>46</sup> *First Report and Order*, 11 FCC Rcd at 8984-85.

regulations as any other CLEC and ETC. Otherwise, wireless carriers will be able to game the regulatory system and to achieve competitive advantage by escaping requirements that would apply if they provided exactly the same service using wireline technology.

The Commission previously has noted that regulatory neutrality is necessary to foster competition. With respect to the 1993 amendments to Section 332 and related sections, the Commission noted that different wireless technologies should be subject to similar regulatory requirements when they were used to provide similar services. The Commission stated, “[w]e interpret the elements of the commercial mobile radio service definition in a manner that ensures that competitors providing similar or identical services will participate in the marketplace under similar rules and regulations. Success in the marketplace thus should be driven by technological innovation, service quality, competition-based pricing decisions, and responsiveness to consumer needs – not by strategies in the regulatory arena.”<sup>47</sup> This is no less true with respect to similar or identical services provided using wireless versus wireline technology. Therefore, the Commission should state clearly that similar services will be similarly regulated, regardless of the technology used.

**C. The Commission Needs to Clarify that Fixed Wireless Services that Substitute for Wireline Services are not CMRS and Should be Regulated as Local Exchange Service**

The Commission should act expediently on this request for declaratory ruling in order to avoid otherwise unnecessary confusion and regulatory turmoil. The facts and circumstances brought to the Commission’s attention both by this petition and by Western Wireless itself in other proceedings demonstrate that Western Wireless’ BUS service offering is not commercial

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<sup>47</sup> *Regulatory Parity Order*, 9 FCC Rcd at 1420.

mobile radio service.<sup>48</sup> Unfortunately, confusion exists in the states over what is and what is not CMRS. Confusion also exists over the extent to which Section 332(c)(3) and other federal law preempts state regulation of fixed wireless services and the states' authority to resolve ETC designation issues.

This confusion must be clarified if the shift from regulation and monopoly to deregulation and market competition is to succeed – it can only succeed where all technologies and service providers are treated equally by the regulatory community. The failure to regulate a service provided over one technology (wireless) is not sustainable where the same service is regulated when it is offered over another technology (wireline). If the public interest is truly served by market competition, the same public interest can not be served where one provider is subject to regulation and another is not. Therefore, the Commission should clarify, so that no question exists for any carrier or regulator, that a wireless carrier's fixed universal service offering that is a substitute for wireline local exchange service should be subject to the same regulatory treatment that is applicable to any other competitor providing the same service using non-wireless

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<sup>48</sup> See Part II, *supra*. Even assuming, *arguendo*, that Western Wireless' BUS offering is CMRS, Kansas still is not preempted by Section 332(c)(3) from applying universal service requirements. Section 332(c)(3) does not allow state regulation of CMRS rates and market entry, except in certain conditions associated with universal service and consumer protection. The fact that Congress created an exception to permit states to regulate even the rates and entry of CMRS providers when CMRS becomes a substitute for a substantial portion of the communications in the state indicates that Congress recognized the need for states to ensure the continued provision of universal service. Therefore, given that Western Wireless seeks ETC status for its BUS offering, which it claims is both a universal service offering and CMRS, and which is a substitute for wireline telephone service for a substantial portion of the state, Kansas is not precluded by Section 332(c)(3) from regulating even the rates and entry conditions associated with Western Wireless' offering of that service. The FCC should therefore clarify that Western Wireless is to be treated for regulatory purposes as any other local exchange carrier with respect to universal service offerings.

technology.


#### **IV. CONCLUSION**

The Commission should declare that Western Wireless' BUS offering in Kansas is not CMRS and that federal law does not prohibit or preempt Kansas from applying to it the same regulations and USF requirements that generally apply to all local exchange carriers' services. Such a declaratory ruling is necessary to end the controversy and to eliminate the confusion that currently exists in the Kansas proceeding aimed at determining whether Western Wireless should be designated as an ETC, especially for the rural service areas it seeks to serve. Such a ruling would not require the KCC to adopt any regulations; it would only make clear that it is not preempted by federal law from applying whatever regulations it applies to all other local exchange carriers. It would also advise the KCC that the BUS offering is subject to local exchange carrier federal regulation, such as provided in Sections 251 (a) and (b).

Respectfully submitted,

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## **ATTACHMENT A**